IN THE SUPREME COURT OF FLORIDA

ESTATE OF MICHELLE EVETTE MCCALL, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

CASE NO. SC11-1148

CERTIFIED QUESTION FROM THE
U.S. COURT OF APPEALS FOR THE 11TH CIRCUIT
(Lower Tribunal Case No. 07-00508CV-3-MCR/EMT)

AMICI CURIAE BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, HEALTH COALITION ON LIABILITY AND ACCESS, PHYSICIANS INSURERS ASSOCIATION OF AMERICA, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF APPELLEE

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QUESTION PRESENTED

Whether Florida's statutory upper limit on medical malpractice noneconomic damages, section 766.118, Florida Statutes, violates the Florida Constitution.

INTEREST OF *AMICI CURIAE*

As organizations representing Florida health care professionals, hospitals, small business owners, and their insurers, that depend upon access to affordable health care for their patients and employees, *amici* have a substantial interest in the continuing applicability of section 766.118, Florida Statutes. *Amici's* members support protections against subjective, runaway noneconomic damage awards and would be adversely impacted if the statute is nullified.

STATEMENT OF THE FACTS

Amici adopt Appellee's Statement of the Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Noneconomic damages awards, such as for pain and suffering, are highly subjective and inherently unpredictable because "juries are left with nothing but their consciences to guide them." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 778 (1985); *see also* Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 Duke L.J. 217, 253-54 (1993).

As broad experience from across the nation demonstrates – and the Florida Legislature found after extensive research, *see* section 766.201, Florida Statutes, Governor's Select Task Force on Healthcare Professional Liability Insurance, Report (2003), *available at* http://www.doh.state.fl.us/myflorida/DOH-Large-Final%20Book.pdf – noneconomic damages limits are an important element of a well-functioning state health care system. They control outlier awards, provide greater predictability in the medical liability system, lower insurance rates, reduce the cost of defensive medicine, and improve access to critical specialists for local residents. *See* Ronald M. Stewart, *Malpractice Risk and Cost Are Significantly Reduced After Tort Reform*, 212 J. Am. Coll. Surg. 463 (2011). They also promote more uniform treatment of individuals with comparable injuries, facilitate settlements, and limit arbitrariness that may raise potential due process problems. *See Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich. 2004), *cert. denied*, 546 U.S. 821 (2005) ("A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled 'punitive.'").

The statute at issue here, section 766.118, Florida Statutes, was a rational legislative response to a medical malpractice insurance crisis that was identified by the Governor's Task Force and by the American Medical Association, among other observers. *See* Task Force Report, *supra*, at iii. The Legislature drew a careful balance. To promote greater access to affordable health care for all Floridians, the

Legislature decided upon a very substantial, but not unlimited, remedy for the distinct minority of Floridians that may claim extraordinary noneconomic loss in medical malpractice cases. Overall, the law is pro-consumer despite the negative impacts to a few, such as Appellants. These impacts are lessened by the fact that, in addition to substantial noneconomic damages, plaintiffs' economic damages are uncapped and punitive damages may be available in appropriate cases. *Amici* urge the Court to uphold section 766.118 and join the clear majority of courts that have respected similar tort policy judgments by legislatures across the country.

ARGUMENT

I. THE EVOLUTION AND RISE OF NONECONOMIC DAMAGES

Initially, the common law rarely recognized damages beyond pecuniary harm. When awarded, noneconomic damages were generally modest and large awards were uniformly reversed. *See* Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Non-economic Compensatory Damages in the Nineteenth Century*, 4. J. Empirical Legal Stud. 365, 379-87 (2007).

Pain and suffering damages first leaped after World War II due to effective advocacy by plaintiffs' lawyers. *See* Melvin M. Belli, *The Adequate Award*, 39 Cal. L. Rev. 1 (1951). For example, during a 9-month period in 1957, there were 53 verdicts of $100,000 or more nationwide, *see* Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the*

Problem and the Legal Academy's First Reponses, 34 Cap. U. L. Rev. 545, 568 (2006),[1] leading scholars to question such awards. *See, e.g.,* Charles A. Wright, *Damages for Personal Injuries,* 19 Ohio St. L.J. 155 (1958). In inflation-adjusted terms, the average pain and suffering award grew from $38,000 in the 1940s and 1950s to $48,000 in the 1960s. *See* David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 301 (1989). By 1971, pain and suffering constituted "the largest single item of recovery exceeding by far . . . medical expenses and lost wages." *Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971).

This trend continued into the beginning of this century. *See* Perry J. Argires, *There Is an Attack on Medical Profession*, Sunday News (Lancaster, Pa.), May 16, 2004, at 1, *available at* 2004 WLNR 11275958 (citing Jury Verdict Research data). Based on data reported by Jury Verdict Research, average jury awards in medical liability cases, driven by large noneconomic damages, increased from just over $1 million in 1994 to almost $5 million in 2002, far outpacing other types of

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[1] Scholars attribute this rise to: (1) the availability of future pain and suffering damages; (2) the rise in automobile ownership and personal injuries resulting from automobile accidents; (3) the greater availability of insurance and willingness of plaintiffs' attorneys to take on more speculative cases; (4) the rise in affluence of the public and a change in public attitude that "someone should pay"; and (5) better organization by the plaintiffs' bar. *See* Merkel, *supra*, at 553-66; *see also* Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. 163, 170 (2004).

claims. *See* Robert P. Hartwig, *Medical Malpractice Insurance & The Insurance Cycle: Medical Professional Liability & the P/C Insurance Industry*, at 57-58 (Ins. Info. Inst. May 15, 2008), *available at* http://www.iii.org/assets/docs/pdf/Medmal_presol.pdf; *see also* Kim Brimer, *Has "Pain and Suffering" Priced Itself Out of the Market?*, Ins. J., Sept. 8, 2003, *available at* http://www.insurancejournal.com/magazines/southcentral/2003/09/08/partingshots/32172.htm. As Fourth Circuit Judge Paul Niemeyer explained, "money for pain and suffering . . . provides the grist for the mill of our tort industry." Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1401 (2004).[2]

II. LIMITS ON SUBJECTIVE NONECONOMIC DAMAGES ARE A KEY COMPONENT OF ACCESSIBLE HEALTH CARE SYSTEMS

The Legislature acted reasonably in adopting section 766.118. Statutory upper limits on noneconomic damages promote access to more affordable health care, benefitting the vast majority of citizens that will never find themselves as plaintiffs in medical negligence lawsuits, while providing substantial compensation for plaintiffs that are harmed as a result of an accident in care.

[2] Due to the adoption of reforms across the country, tort costs from medical malpractice liability have generally remained stable since 2005. *See* Towers Watson, *U.S. Tort Cost Trends: 2010 Update, at* 17, *available at* http://www.towerswatson.com/assets/pdf/3424/Towers-Watson-Tort-Report-1.pdf. Nullification of limits on noneconomic damages such as those provided by section 766.118 would upset this trend and increase health care costs and premiums.

A. Avoiding Unpredictable and Excessive Awards

Through section 766.118, the Legislature sought to provide greater consistency and predictability in Florida's medical liability system. The Legislature made a rational judgment to promote access to more affordable health care for all Floridians by reining in extraordinary noneconomic damage awards. *See* Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. of Legal Studies S183, S221 (2007).

B. Reducing the Cost of Medical Liability Insurance

There is also a sizable body of literature demonstrating that limits on noneconomic damages can significantly lower medical liability insurance premiums. *See* Carol Kane & David Emmons, *The Impact of Liability Pressure and Caps on Damages on the Healthcare Market: An Update of Recent Literature* at 1 (Am. Med. Ass'n 2007), *available at* http://www.ama-assn.org/ama1/pub/upload/mm/363/prp2007-1.pdf. Insurers set premium rates to account for the level of uncertainty regarding the risk of loss. Statutory limits on pain and suffering awards provide a means for insurers to predict losses more accurately and thereby eliminate this "ambiguity premium," reducing costs to insured physicians.

On average, internal medicine premiums are 17.3% less in states with limits on noneconomic damages. *See* Kane & Emmons, *supra*, at 3 (citing Meredith L.

Kilgore et al., *Tort Law and Medical Malpractice Insurance Premiums*, 43 Inquiry 255 (2006)). Noneconomic damage limits have the greatest positive impact on doctors practicing in critical areas, such as obstetrics. *See id.*

C. Increasing Access to Health Care for Local Residents

In addition, "[m]any studies demonstrate that professional liability exposure has an important effect on recruitment of medical students to the field and retention of physicians with the field and within a particular state." Robert L. Barbieri, *Professional Liability Payments in Obstetrics and Gynecology,* 107:3 Obstetrics & Gynecology 578, 578 (Mar. 2006). States with limits on noneconomic damages generally experience greater increases in the number of doctors per capita. *See* William E. Encinosa & Fred J. Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, 24 Health Aff. 250 (2005). If a state's legal climate is not competitive, doctors will go elsewhere with profoundly deleterious consequences to that state's health and economy. *See* Joseph Nixon, Editorial, *Why Doctors Are Heading to Texas*, Wall St. J., May 17, 2008, at A9, *abstract available at* 2008 WLNR 9419738.[3]

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[3] *See also* Ralph Blumenthal, *More Doctors in Texas After Malpractice Cap*, N.Y. Times, Oct. 5, 2007, *available at* http://www.nytimes.com/2007/10/05/us/05doctors.html; Chiu-Fang Chou & Anthony T. Lo Sasso, *Practice Location Choice by New Physicians: The Importance of Malpractice Premiums, Damage Caps, and Health Professional Shortage Area Designation*, 44 Health Serv. Res. 1271 (2009), *available at* 2009 WLNR 15574372; Daniel P. Kessler et al., *Impact*

D. Reducing the Cost of Defensive Medicine

Furthermore, limits on noneconomic damages reduce the practice of "defensive" medicine, such as tests ordered out of excessive caution because of concern over potential liability rather than medical need. A 2005 survey in the *Journal of the American Medical Association* found that virtually 93% of high-risk specialists in Pennsylvania ordered unnecessary tests, performed unwarranted diagnostic procedures, and referred patients for unneeded consultations to protect themselves from litigation. *See* David M. Studdert et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293:1 JAMA 2609, 2609 (June 1, 2005). In a 2008 survey, 83% of Massachusetts physicians reported practicing defensive medicine; the survey also concluded that about 25% of all radiological imaging tests were ordered for defensive purposes, and 28% and 38%, respectively, of those surveyed admitted reducing the number of high-risk patients they saw and limiting the number of high-risk procedures or services they performed. *See* Massachusetts Medical Society, Press Release, *MMS First-of-its-kind Survey of Physicians Shows Extent and Cost of the Practice of Defensive Medicine and its Multiple Effects of Health Care on the State* (Nov. 17, 2008), *available at* http://www.massmed.org/AM/Template.cfm?Section=

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of Malpractice Reforms on the Supply of Physician Services, 293 JAMA 2618 (2005).

Advocacy_and_Policy&TEMPLATE=/CM/ContentDisplay.cfm&CONTENT ID=23559. In a national survey, "79% of physicians said they had ordered more tests than they would, based only on professional judgment of what is medically needed, and 91% have noticed other physicians ordering more tests." U.S. Dep't of Health & Human Servs., *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs By Fixing Our Medical Liability System* 4 (2002), *available at* http://aspe.hhs.gov/daltcp/reports/litrefm.htm. These costs are passed almost entirely to the consumer, if not directly, then indirectly through private or public insurance plans.

"[M]alpractice reforms that directly reduce provider liability pressure lead to reductions of 5 to 9 percent in medical expenditures without substantial effects on mortality or medical complications." Donald J. Palmisano, *Health Care in Crisis: The Need for Medical Liability Reform*, 5 Yale J. Health Pol'y, L. & Ethics 371, 377 (2005) (quoting Daniel P. Kessler & Mark B. McClellan, *Do Doctors Practice Defensive Medicine? 2* (Nat'l Bur. of Econ. Analysis, Working Paper No. 5466, 1996), *available at* http://www.nber.org/papers/w5466.pdf)); *see also* Leonard J. Nelson et al., *Medical Malpractice Reform in Three Southern States*, 4 J. Health & Biomedical L. 69, 84 (2008) (studies "have found a link between the adoption of malpractice reforms and the reduction of defensive medical practices.").

III. EXPERIENCE SHOWS THAT LIMITING NONECONOMIC DAMAGES IMPROVES ACCESSIBILITY TO HEALTH CARE

As examples of the benefits of limits on noneconomic damages on the health care system, this Court might look to the experience of other states. *Amici* bring to the Court's attention the experiences of Mississippi and West Virginia, because we believe them to be representative and because we understand that other *amici* intend to discuss states including California and Texas.

A. Case Study: Mississippi

Between 1999 and 2001, Mississippi experienced a surge in medical liability lawsuits. As one reporter wrote in 2002: "Mississippi, largely because it is one of only a few states that does not cap verdicts on noneconomic damages, has become a hotbed for such litigation because jury verdicts have been unusually high . . . ." Tim Lemke, *Best Places to Sue? Big Civil Verdicts in Mississippi Attract Major Litigators*, Wash. Times, June 30, 2002, at A1, *available at* 2002 WLNR 402634. Mississippi's health care system was negatively impacted. *See* Sherman Joyce & Michael Hotra, *Mississippi's Civil Justice System: Problems, Opportunities, and Some Suggested Repairs*, 71 Miss. L.J. 395, 417 (2001). By 2002, Mississippi had the lowest number of physicians per capita in the country and was losing doctors to other states. *See* Lynne Jeter, *Tort Reform Impact Ripples Out Through Economy*, Miss. Bus. J., Nov. 29, 2004, at S30, *available at* 2004 WL 14445074. Trying to recruit doctors to practice in the state was "a nightmare." *Id.* (quoting Mississippi

State Medical Association's past president Hugh Gamble II, M.D.). Other doctors restricted their practices due to liability concerns, *see* Sarag Domin, Comment, *Where Have All the Baby-Doctors Gone? Women's Access to Healthcare in Jeopardy: Obstetrics and the Medical Malpractice Insurance Crisis*, 53 Cath. U. L. Rev. 499 (2004), "leaving most Mississippi cities with populations of less than 20,000 people with no local obstetricians." *Id.* at 501.

The Mississippi legislature responded by adopting a $500,000 noneconomic damage limit applicable in most medical liability actions, among other reforms, in late 2002. *See* H.B. 2, 2002 3rd Ex. Sess. (Miss. 2002) (codified at Miss. Code Ann. § 11-1-60(2)(a)). Two years later, the state legislature strengthened the 2002 law by deleting exceptions as well as scheduled increases in the limit. *See* H.B. 13, 2004 1st Ex. Sess., § 2 (Miss. 2004) (codified at Miss Code Ann. § 11-1-60(2)(a)).

Within two years, "the problems in malpractice insurance seem to have abated." Nelson et al., *supra*, at 139. The number of tort lawsuits against Mississippi physicians, especially OB/GYNs, has fallen dramatically. *See* Mark A. Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118:2 Obstetrics & Gynecology 335 (Aug. 2011) (from 2005-2009, average lawsuits per year against physicians insured by Mississippi's leading medical liability insurer dropped significantly from pre-tort reform years, with even fewer average lawsuits per year against OB/GYNs). Medical liability insurance premiums have been both

reduced and refunded each year since the legislation was implemented. *See* American Medical Association, *Medical Liability Reform – NOW!*, at 24 (Feb. 1, 2011), *available at* http://www.ama-assn.org/ama1/pub/upload/mm/378/mlr-now-2011.pdf. No longer considered a "crisis" state for medical liability insurance, *see* Amy Lynn Sorrel, *Tort Reforms Boost Some States' Liability Outlook*, Am. Med. News, Mar. 5, 2007, *available at* http://www.ama-assn.org/amednews/2007/03/05/prsc0305.htm, Mississippi went "from being the poster child of litigation abuse to a shining example of how a state can join the legal mainstream and foster economic growth through legal reform." Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 Miss. C.L. Rev. 393, 395 (2005).

B. Case Study: West Virginia

In 2002, the National Governors Association listed West Virginia as a case study of a medical malpractice insurance crisis. *See* National Governors Ass'n Center for Best Practices, Addressing the Medical Malpractice Insurance Crisis, at 12 (2002), *available at* http://www.nga.org/cda/files/1102medmalpractice.pdf. West Virginia doctors paid substantially higher premiums than those in neighboring Ohio and Virginia, liability carriers reported substantially higher defense costs than the national average, and a lead medical malpractice insurer left the market. *Id.* Four in ten physicians were considering leaving West Virginia,